

1 DAVID ROGER
District Attorney
2 **CIVIL DIVISION**
State Bar No. 002781
By: **LAURA C. REHFELDT**
3 Deputy District Attorney
State Bar No. 005101
4 500 South Grand Central Pkwy.
P. O. Box 552215
5 Las Vegas, Nevada 89155-2215
(702) 455-4761
6 Fax (702) 382-5178
Attorneys for the Office of the
7 Clark County Public Defender,
Public Defender Philip J. Kohn,
8 and Deputy Public Defender
Tierra D. Jones
9

10 UNITED STATES DISTRICT COURT

11 DISTRICT OF NEVADA

12 NATHANIEL BANKS, JR.,

13 Plaintiff,

14 vs.

15 CLARK COUNTY, NEVADA, a
Governmental Body or Entity;
16 CLARK COUNTY PUBLIC DEFENDER
PHILIP J. KOHN, Individually and also
17 the AGENCY or OFFICE itself of
CLARK COUNTY PUBLIC DEFENDER;
18 TIERRA D. JONES, Individually and as a
Deputy Clark County Public Defender;
19 LAS VEGAS JUSTICE COURT;
CLARK COUNTY DETENTION
20 CENTER; Doe Individuals or
Administrators 1-10,
21 Roe Entities 1-10,
Roe Institutions and Agencies 11-20,

22 Defendant.
23

Case No: 2:09-cv-02424


24 **PUBLIC DEFENDER DEFENDANT'S REPLY TO**
PLAINTIFF'S OPPOSITION TO
25 **PUBLIC DEFENDER DEFENDANT'S MOTION TO DISMISS**

26 Defendants, the Clark County Public Defender, Philip J. Kohn, the Office of the Clark
27 County Public Defender, Deputy Public Defender, Tierra D. Jones (collectively referred to
28

as the “Public Defender Defendants”), hereby file a Reply to Plaintiff’s Opposition to Public Defender Defendant’s Motion to Dismiss (“Opposition”) in the above matter.

DATED this 17th day of February, 2010.

DAVID ROGER
DISTRICT ATTORNEY

By: 
LAURA C. REHFELDT
Deputy District Attorney
State Bar No. 005101
500 South Grand Central Pkwy.
P. O. Box 552215
Las Vegas, Nevada 89155-2215
Attorney for the Clark County Public Defender,
Philip J. Kohn and Tierra D. Jones

ADDITIONAL FACTS

Based on Plaintiff’s Opposition, additional facts are relevant in support of the Public Defender Defendant’s Motion to Dismiss.

At the conclusion of Plaintiff’s preliminary hearing, and after the in-chambers discussion, Defendant Jones moved for dismissal of the case. (Opposition, Preliminary Hearing Transcript attached thereto, p. 24, lines 1-17 of Transcript). Additionally, after the prosecutor moved to amend the charge of misdemeanor harassment and sentence Plaintiff to six months, Defendant Jones argued that the sentence be suspended. (Opposition, Preliminary Hearing Transcript attached thereto, p. 25, lines 6-11 of the Transcript).

POINTS AND AUTHORITIES

Plaintiff misses the point with respect to a motion to dismiss. Plaintiff seems to be looking for a “form of conciliatory” or “apologetic message” (Opposition, p. 3, line 9), or an “explanation” (Opposition p. 17, line 14), while at the same time scolding the Public Defender Defendants for discussing relevant facts of the Plaintiff’s underlying criminal case (Opposition p.3, lines 1-5). The purpose of a motion to dismiss is to look at the sufficiency of the allegations of the complaint. The Public Defender Defendants submit that the Amended Complaint fails to state a claim for which relief can be granted as Plaintiff can prove no set of

facts supporting his claim that would entitle him to relief; his complaint lacks a cognizable legal theory; and allegations in the complaint can be dismissed based on dispositive issues of law. Federal Rule of Civil Procedure 12(b)(6); Navarro v. Block, 250 F.3d 729, 732 (9th Cir.2001). Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir.1984); see also Neitzke v. Williams, 490 U.S. 319, 326, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989).

I. There is No Cause of Action Against the Office of the Clark County Public Defender

Plaintiff fails to controvert Wayment v. Holmes, 112 Nev. 232, 912 P.2d 816 (1996) which holds that a department of a public entity may not be sued, and Garcia v. City of Merced, 637 F.Supp.2d 731, 760 (E.D. Cal. 2008) which holds that the term “persons” for § 1983 purposes does not encompass municipal departments. Plaintiff appears to concede this as he acknowledges “that may merely require a slight modification of the caption.” (Opposition, p. 5, line 17-18.) Thus, pursuant to Wayment and Garcia, the Office of the Public Defender can not be a party to this case and must be dismissed.

II. There is No Cause of Action for Violation of § 1983

A. Defendant Jones was Not Acting Under the Color of State Law and There is Not a Conspiracy.

Plaintiff makes a weak attempt at alleging a conspiracy cause of action in his Amended Complaint.¹ The only reference to a conspiracy in the Amended Complaint is at paragraph 53² which states:

[U]pon information that is available, it appears that Defendant Tierra Jones, while acting as a representative of Defendant CCPD and employee of Clark County Nevada, conspired (even passively) in an off-the-record discussion with others, while acting under color of state law, and then cooperated in and/or acquiesced in subsequent conduct taking place in a proceeding wherein Plaintiff’s fundamental civil rights were violated as more fully

¹ Plaintiff’s Opposition references a § 1985 action. (Opposition p. 6, line 6). However, a § 1985 action is not alleged in the Amended Complaint.

² Plaintiff also claims that there is liability for state tort law civil conspiracy, but that is not alleged in the Amended Complaint. (Opposition p. 6, lines 16-17).

1 alleged hereinabove, and then failed to attempt to correct or appeal the
2 violations.

3 As stated in the Public Defender Defendant's Motion to Dismiss, the law states that
4 "[t]o prevail on a claim for conspiracy to violate one's constitutional rights under § 1983, the
5 plaintiff must show specific facts to support the existence of the claimed conspiracy."
6 Avalos v. Baca, 517 F.Supp.2d 1156, 1169 (C.D. Cal. 2007) (citing Burns v. County of
7 King, 883 F.2d 819, 821 (9th Cir.1989).

8 [T]he elements to establish a cause of action for conspiracy under § 1983
9 are: (1) the existence of an express or implied agreement among the
10 defendant officers to deprive him of his constitutional rights, and (2) an
11 actual deprivation of those rights resulting from that agreement. (citation
12 omitted). In addition, there must be an agreement or meeting of the minds
13 to violate his constitutional rights. (citation omitted). A formal agreement
14 is not necessary; an agreement may be inferred from the defendant's acts
15 pursuant to this scheme or other circumstantial evidence. (citation omitted).

16 Avalos at 1169-1170.

17 While Plaintiff is under the belief that, throughout his Amended Complaint, he makes
18 allegations sufficient to support a conspiracy charge, his allegations fail. However, his
19 Opposition cites to no references in the Complaint and there is no attempt to explain how he
20 meets the standard set by the 9th Circuit, as set forth above. Plaintiff does not allege specific
21 facts supporting a conspiracy. Facts have not been alleged supporting an agreement or a
22 meeting of minds between the defendants to deprive Plaintiff of his constitutional rights.
23 Plaintiff mentions a "discussion", and then alleges "subsequent conduct" and then a violation
24 of civil rights. However, the Amended Complaint is completely void of specific facts
25 showing an agreement to deprive him of his constitutional rights.

26 Significantly, the preliminary hearing transcript shows that Defendant Jones not only
27 moved for dismissal of the case, but also argued that Plaintiff's sentence be suspended.
28 (Opposition, Preliminary Hearing Transcript attached thereto p. 25, lines 1-17; page 25, lines
29 6-11 of the Transcript). These are facts provided by the Plaintiff and clearly indicate that

1 there was not a conspiracy to deprive Plaintiff of his civil rights. If there was, Defendant
2 Jones would not have been arguing for dismissal of the case or a suspended sentence.

3 It is inconceivable that a § 1983 action could arise from a judge calling the attorneys
4 into chambers. Further, imagine what the court case load would be if every party to a lawsuit
5 sued for conspiracy to commit a violation of § 1983 every time a judge called the attorneys
6 into chambers, or even to the bench. Plaintiff has not and cannot plead a conspiracy of §
7 1983 between the prosecutor, judge and Defendant Jones in this case. Since the conspiracy
8 fails, then there is no claim for a § 1983 action against Defendant Jones as she was
9 performing the traditional functions of a criminal defense counsel, and, therefore, not acting
10 under "color of state law". Polk County v. Dodson, 454 U.S. 312, 324 (1981); Miranda v.
11 Clark County, Nevada, 319 F.3d 465, 468 (9th Cir. 2003).

12 **B. Plaintiff has Not Plead that his Underlying Conviction or Sentence was**
13 **Exonerated.**

14 In his Opposition, Plaintiff argues that he is somehow exempt from the requirement
15 that he prove exoneration of his underlying criminal conviction or sentence prior to bringing
16 this § 1983 action, as required by Heck v. Humphrey, 512 U.S. 477 (1994). Plaintiff
17 primarily relies on the case of Huang v. Johnson, 251 F.3d 65 (2nd Cir. 2001) in support of
18 his position. In that case the plaintiff was sentenced to a period of time in a youth facility.
19 Eventually, he was transferred to a day program. The plaintiff went AWOL from the
20 program, was arrested on an unrelated charge and held in custody at the city jail. The
21 plaintiff's release date from the youth facility was set back the amount of time he was
22 AWOL. The plaintiff brought a § 1983 action for not being credited at the youth facility for
23 the time spent in the city jail. Under these circumstances, Huang held that the plaintiff's §
24 1983 action was not barred by Heck because he challenged the duration of the confinement,
25 not the validity of the conviction. Heck explicitly states that to recover for damages from an
26 allegedly unconstitutional conviction or imprisonment, the unlawfulness must render a
27 conviction or sentence invalid. Heck, 512 U.S. at 486-487. Huang does not apply to the
28 present case since the plaintiff's success in that case would not render the conviction or

1 sentence invalid. The allegations of the plaintiff in Huang had nothing to do with the
2 underlying conviction or the sentence. Instead, he challenged the calculation of the duration
3 of his confinement. In the case at bar, Plaintiff's challenges directly relate to the conviction
4 of harassment and 6 month sentence, and, if he were to be successful, the conviction and
5 sentence would be rendered invalid.

6 Plaintiff also relies on the case of Haupt v. Dillard, 17 F.3d 285 (9th Cir. 1994) in
7 support of his argument that he is entitled to an exemption from the Heck rule (even though
8 Heck is not cited in Haupt). In that case the plaintiff was acquitted on charges of murder and
9 kidnapping. The plaintiff brought a § 1983 action that included an allegation of violation of
10 the 6th Amendment right to a fair trial. The court held that the plaintiff had a cause of action
11 for denial of due process because he was not convicted but, instead, acquitted of the charges.
12 Thus, even if Heck was raised, Haupt would not apply since success in the case would not
13 render Plaintiff's harassment conviction or the 6 month sentence invalid. In the present case,
14 Plaintiff is directly challenging the underlying misdemeanor conviction and sentence. Thus,
15 success by the Plaintiff would necessarily imply the validity of the conviction and the
16 sentence.

17 The 9th Circuit case of Nonnette v. Small, 316 F.3d 872 (9th Cir. 2002) involved a
18 Plaintiff who sought § 1983 relief for violation of rights in a disciplinary proceeding and the
19 resulting loss of good time credits. The plaintiff could not seek habeas relief because he had
20 been released from prison and the action would have been dismissed on grounds it was moot.
21 The court held that the plaintiff had a § 1983 action even though success would imply the
22 invalidity of the disciplinary proceeding that resulted in the revocation of the good time
23 credits. However, significantly, the 9th Circuit expressly limited its ruling to former prisoners
24 who are not challenging their underlying criminal convictions or sentences. In doing so it
25 emphasized that:

26 [O]ur holding affects only former prisoners challenging loss of good-time
27 credits, revocation of parole or similar matters; the status of prisoners
28 challenging their underlying convictions or sentences does not change upon

1 release, because they continue to be able to petition for a writ of habeas
2 corpus.

3 Nonnette at 878, FN7. Plaintiff also cites Wilson v. City of Fountain Valley, 372 F.Supp.2d
4 1178 (C.D. Cal. 2004), however, that § 1983 action challenged a parole revocation, not an
5 underlying conviction or sentence and, further, the plaintiff's success would not necessarily
6 imply that the revocation was invalid.

7 The cases cited by Plaintiff do not support his position that he has sufficiently plead a
8 § 1983 action. The cases cited by the Plaintiff do not involve direct challenges to their
9 underlying criminal convictions. Those cases deal with the calculation of a term of
10 confinement, procedural challenges to a trial that did not result in a conviction, and
11 revocation of good time credits. Further, the 9th Circuit specifically narrowed its application
12 of Nonette to out-of-custody prisoners who challenge matters like good time credits and
13 parole revocation. Here, Plaintiff is not making challenges to good time credits, parole
14 revocations or the like. Plaintiff's allegations directly relate to the underlying conviction and
15 sentence and since his civil rights allegation, if successful, would necessarily invalidate the
16 underlying criminal conviction and sentence, Plaintiff is barred by Heck.

17 **C. Judge Zimmerman's Ruling Severed the Chain of Causation**

18 As argued by the Public Defender Defendants in their Motion to Dismiss, Judge
19 Zimmerman's decision to adjudicate Plaintiff guilty of a misdemeanor harassment and
20 sentence him to six months jail severs the causation between Plaintiff's alleged damages and
21 any alleged wrongdoing by the Public Defender Defendants. Plaintiff has cited no legal
22 authority supporting his position that the judge's decision is not an intervening superseding
23 event that breaks the causation. Instead, he tries to distinguish the facts in this case from the
24 cases the Public Defender Defendants cited in support of their position by stating that they
25 "rely upon situations where there was an unconstitutional search or procurement of a
26 confession and where the judge later made an error of law in dealing with the issue."
27 (Opposition, p. 16, lines 17-19). Obviously, Plaintiff did not read Egervary v. Young, 366
28

1 F.3d 238, 249-250 (3d Cir. 2004), a case cited by the Public Defender Defendants, as that
2 case involved an international child custody dispute. That court held that:

3 . . . where, as here, the judicial officer is provided with the appropriate
4 facts to adjudicate the proceeding but fails to properly apply the governing
5 law and procedures, such error must be held to be a superseding cause,
6 breaking the chain of causation of purposes of § 1983.

7 Egervary at 251-252. In the case of Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959),
8 overruled in part on other grounds, Cohen v. Norris, 300 F.2d 94 (9th Cir. 1962) a
9 plaintiff brought a civil rights action arising out of an alleged conspiracy for wrongful
10 incarceration in a state mental hospital. The court addressed the issue of proximate
11 causation on appeal of a motion to dismiss and held that:

12 [W]here the gravamen of the injury complained of is commitment to an
13 institution by court order, this order of the court, right or wrong, is
14 ordinarily the proximate cause of the injury. Various preliminary steps
15 occur before the order is made. These preliminary steps may range from
16 such matters as filing of petitions to various clerical and procedural
17 activities which lead to the order. In the ordinary case, the order is made
18 after a hearing in court or after consideration by the court of the supporting
19 documents and evidence. Therefore, the various preliminary steps would
20 not cause damage unless they could be said to be the proximate cause of the
21 injury. In the usual, case, the order of the court would be the proximate
22 cause and the various preliminary steps would be remote causes of any
23 injury from imprisonment or restraint under the court order.

24 Hoffman at 296-297.

25 Judge Zimmerman is a Justice of Peace in the Las Vegas Township and the large
26 majority of her work consists of conducting arraignments, misdemeanor trials and
27 preliminary hearings in criminal cases. Judge Zimmerman heard the facts of the case, but
28 misapplied the law and procedure when she found Plaintiff guilty of a misdemeanor and
sentenced him to six months. The words "judgment entered case closed" are stamped on the
Justice Court Minutes and signed by Judge Zimmerman. (Opposition, Justice Court
Minutes attached thereto). Thus, it is the order of the court, not the Public Defender
Defendants, that is the proximate cause of injury, if any, to the Plaintiff.

D. The § 1983 Action is Insufficiently Plead as to Defendant Kohn

Plaintiff has not disputed that the § 1983 action is insufficiently plead as to Defendant Kohn. (Opposition pp. 24-25). Nowhere in the Opposition does Plaintiff argue that his Amended Complaint was sufficiently plead as to this issue. With respect to the § 1983 claim against Defendant Kohn, the Clark County Public Defender, Plaintiff failed to allege any policy, practice or custom that resulted in a constitutional injury. Monell v. Dep't. of Soc. Servs., 436 U.S. 658, 690-91 (1978); Miranda v. Clark County, 319 F.3d 465, 469-471 (9th Cir. 2003); Avalos v. Baca, 517 F.Supp.2d 1156, 1162 (C.D. Cal. 2007). Additionally, Plaintiff has failed to dispute that Defendant Kohn was not a moving force behind Plaintiff's alleged injuries. Paiva v. City of Reno, 939 F.Supp. 1474, 1489 (D.Nevada 1996).

In the Amended Complaint, Plaintiff makes very generic, conclusory allegations as to Defendant Kohn which do not constitute allegations of an official policy, custom, or practice. This was argued in the Public Defender Defendant's Motion to Dismiss and Plaintiff has not refuted it in his Opposition. Furthermore, since the Plaintiff has named the County as well as Public Defender Philip Kohn in his official capacity, then the claim against Defendant Kohn should be dismissed. See Vance v. County of Santa Clara, 928 F.Supp. 993, 996 (N.D. Cal. 1996) (if individuals are sued in their official capacity as municipal officials and the municipal entity itself is also sued, then the claims against the individuals are duplicative and should be dismissed).

III. The Public Defender Defendants are Not Liable for State Law Claims

A. Defendant Kohn is Not Liable for the Negligence of his Deputies

Plaintiff claims that he has alleged the appointment of an incompetent deputy by Defendant Kohn, but fails to cite to the allegation in the Amended Complaint. (Opposition p. 24, lines 9-14). Additionally, Plaintiff makes no attempt to argue in the Opposition that he alleged personal participation by Defendant Kohn on the alleged misconduct of Defendant Jones. See Sanchez v. Murphy, 385 F.Supp. 1362 (D. Nev. 1974). Thus, the state actions against Defendant Kohn must be dismissed.

1 **B. Plaintiff's Conviction has Not been Reversed on Appeal**

2 Plaintiff has not cited any authority in support of his claim that his arguments and
3 exceptions to Heck automatically apply to a state malpractice claim brought by a client
4 against his public defender. The case of Morgano v. Smith, 110 Nev. 1025, 1028, 879 P.2d
5 735 (1994) explicitly states that in a malpractice claim against a criminal defense attorney, a
6 plaintiff must actually plead exoneration of the underlying criminal offense. Plaintiff has not
7 met this pleading requirement and has provided no authority to the contrary.

8 As stated by the Public Defender Defendants in their Motion to Dismiss, Morgano
9 was applied to private defense attorneys. As argued by Plaintiffs, Morgano cited a Nevada
10 case that applied discretionary immunity to public defenders. However, the Public Defender
11 Defendants have not and do not intend to assert this defense. Thus, the application of the
12 ruling of Morgano (that plaintiff must establish exoneration or reversal of his underlying
13 criminal conviction before his claim against his criminal defense attorney is ripe) is
14 completely appropriate for defendants who are public defenders. In fact other states have
15 applied such a ruling to public defenders. See Shaw v. State, Dept. of Admin., PDA, 816
16 P.2d 1358 (Alaska 1991); Rowe v. Schreiber, 725 So.2d 1245 (Fla.App. 1999).

17 For the same reasons set forth in Morgano, Plaintiff's actions for malpractice,
18 negligence and/or breach of fiduciary duty, and intentional or negligent emotion distress, are
19 not ripe as causation does not exist without exoneration or reversal of the underlying
20 conviction.

21 **C. Judge Zimmerman's Ruling Severed the Causation**

22 As discussed above, Judge Zimmerman's ruling that Plaintiff was guilty of
23 misdemeanor harassment and her decision to sentence him to a six-month jail term severs
24 any causation between any alleged wrongdoing of the Public Defender Defendants and
25 Plaintiff's injuries. As a result, Plaintiff has failed to state a claim for which relief can be
26 granted as to the state claims.

27 **D. False Imprisonment Allegation**

28 Plaintiff has not addressed the false imprisonment allegation in his Opposition. He


1 has not refuted the position of Public Defender Defendants that there is no claim for false
2 imprisonment against the Public Defender Defendants. Therefore, that claim must also fail.

3 **CONCLUSION**

4 Based on the foregoing, the Public Defender Defendants respectfully request that
5 Plaintiff's Amended Complaint be dismissed.

6 DATED this 17th day of February, 2010.

7 DAVID ROGER
DISTRICT ATTORNEY

8
9 By: 
10 LAURA C. REHFELDT
Deputy District Attorney
State Bar No. 005101
11 500 South Grand Central Pkwy.
P. O. Box 552215
12 Las Vegas, Nevada 89155-2215
Attorney for the Clark County Public Defender,
Philip J. Kohn and Tierra D. Jones
13

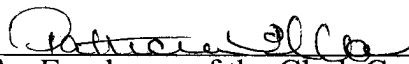
14 **CERTIFICATE OF SERVICE**

15 I certify that I am an employee of the Office of the Clark County District Attorney
16 and that on this 17th day of February, 2010, I served a true and correct copy of the foregoing
17 **Public Defender Defendant's Reply to Plaintiff's Opposition to Public Defender**
18 **Defendant's Motion to Dismiss** through CM/ECF Electronic Filing system of the United
19 States District Court for the District of Nevada (or, if necessary, by U.S. Mail, first class,
20 postage pre-paid), upon the following:

21 Craig R. Anderson
MARQUIS & AURBACH
22 canderson@marquisaurbach.com

23 Thomas J. Tanksley, Esq.
THOMAS J. TANKSLEY, LTD.
24 lawbytank@aol.com

25 Robert J. Gower
DISTRICT ATTORNEY-CIVIL DIVISION
26 ROBERT.GOWER@ccdanv.com

27 
28 An Employee of the Clark County District
Attorney's Office – Civil Division